

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, : 10-CR-687 (CBA)

-against-

United States Courthouse  
Brooklyn, New York

MARK THOMPSON, : December 21, 2010  
Defendant. : 9:30 a.m.

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TRANSCRIPT OF CRIMINAL CAUSE FOR SENTENCING  
BEFORE THE HONORABLE CAROL B. AMON  
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

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Proceedings

2

1 (In open court.)

2 (Judge Amon takes the bench.)

3 (Defendant enters.)

4 COURTROOM DEPUTY: United States against Thompson.

5 Please state your appearances for the record.

6 MR. TOOSSI: Amir Toossi for the Government, and

7 Cheryl Fiorillo from Probation. Good morning, your Honor.

8 THE COURT: Good morning.

9 MR. CREIZMAN: Good morning, your Honor. Eric

10 Creizman, CJA appointed counsel for Mr. Thompson from Gibson,

11 Dunn and Crutcher.

12 THE COURT: Good morning.

13 I think the first matter that we need to take up is

14 the plea before the magistrate judge.

15 MR. CREIZMAN: Yes, your Honor.

16 THE COURT: I just wanted to see a plea agreement.

17 The Government is providing me a copy.

18 (Pause in the proceedings.)

19 THE COURT: I've reviewed the minutes.

20 Have you reviewed the minutes, Mr. Toossi?

21 MR. TOOSSI: Actually, I apologize. No, your Honor,

22 I haven't.

23 THE COURT: Pardon me?

24 MR. TOOSSI: I did not, no.

25 THE COURT: Mr. Creizman, have you reviewed the

Proceedings

3

1 minutes?

2 MR. CREIZMAN: Your Honor, I don't believe I have.

3 THE COURT: The only concern I have, and it's  
4 entirely possible that I missed it, but I don't believe that  
5 the defendant was advised of his appeal waiver.

6 MR. TOOSSI: I believe he was. I don't have any  
7 specific recollection of that.

8 MR. CREIZMAN: I believe he was also, but I also  
9 don't have a specific recollection.

10 THE COURT: Okay. Let me see.

11 (Pause in the proceedings.)

12 THE COURT: I have a copy of the minutes, and I just  
13 want to have the parties look at it.

14 Do you have your own copy?

15 MR. CREIZMAN: I don't, actually. I didn't bring it  
16 here.

17 THE COURT: It's entirely possible I missed it, but  
18 I want to advise the defendant of that before I accept the  
19 plea.

20 MR. CREIZMAN: Sure.

21 THE COURT: I could have certainly missed it.

22 (Pause in the proceedings.)

23 MR. TOOSSI: Your Honor, it's here.

24 THE COURT: It is there?

25 MR. TOOSSI: It's on page ten between lines eleven

Proceedings

4

1 and sixteen.

2 THE COURT: Okay. Great. Thank you.

3 (Pause in the proceedings.)

4 THE COURT: No, that just says --

5 MR. TOOSSI: That's not the plea agreement waiver.  
6 That's just his waiver of rights.

7 That's the only reference to his right to appeal  
8 that I can see in there. So I think your Honor is correct; I  
9 don't think he was advised of his appellate waiver that's  
10 contained in the plea agreement.

11 THE COURT: Then before I accept the plea, I want to  
12 make sure that the defendant understands that.

13 Mr. Thompson, pursuant to the terms of your plea  
14 agreement, you gave up another right that you had in addition  
15 to your right to trial and all the other rights that were  
16 addressed by the magistrate judge. You also gave up your  
17 right to file an appeal or otherwise challenge by petition  
18 pursuant to 28 U.S.C. Section 2255 or any other provision the  
19 conviction or sentence in the event that the Court imposed a  
20 term of imprisonment of fourteen months or below.

21 What that means is ordinarily if you plead guilty,  
22 that means you've admitted the crime. You can't go back and  
23 file an appeal on whether you did the crime or not, but you do  
24 have a right, absent an agreement like this, to appeal your  
25 sentence if you thought the court made some mistake in

Proceedings

5

1 imposing your sentence.

2 Do you understand that?

3 THE DEFENDANT: Yes, your Honor.

4 THE COURT: But in this plea agreement, you're  
5 giving up that right to appeal your sentence or the right to  
6 come back later at some time when you're in custody and file a  
7 habeas corpus petition about your sentence or conviction as  
8 long as I give you a sentence of fourteen months or below.

9 Did you understand that at the time you pled guilty?  
10 Did you know that provision was in your plea agreement?

11 THE DEFENDANT: Yes.

12 THE COURT: Well, do you understand what right  
13 you're giving up in connection with that as part of your plea  
14 agreement?

15 THE DEFENDANT: Yes, your Honor.

16 THE COURT: Do you still want to pursue your plea of  
17 guilty and have me accept that plea of guilty, or not?

18 THE DEFENDANT: Yes, your Honor.

19 THE COURT: So you still want to plead guilty?

20 THE DEFENDANT: Yes.

21 THE COURT: All right. Well, with that addition,  
22 and having reviewed the plea minutes, I'm satisfied that I  
23 should now accept the recommendation to accept the guilty  
24 plea. There was a factual basis for the plea, and the  
25 defendant was acting knowingly and voluntarily and appears

Proceedings

6

1 from the colloquy to understand his rights and the  
2 consequences of his plea. So I'll accept the plea.

3 Now, let me ask you, Mr. Creizman, have you been  
4 over the presentence report?

5 MR. CREIZMAN: I have, your Honor.

6 THE COURT: Have you discussed it with your client?

7 MR. CREIZMAN: I have.

8 THE COURT: Mr. Thompson, have you read the  
9 presentence report?

10 THE DEFENDANT: Yes, your Honor.

11 THE COURT: And have you discussed it with your  
12 lawyer?

13 THE DEFENDANT: Yes.

14 THE COURT: Are you satisfied to have him represent  
15 you?

16 THE DEFENDANT: Yes.

17 THE COURT: Now, I received, actually, two letters,  
18 a substantive letter from you, counsel, dated December 10th  
19 and then a letter supplementing the basis for wanting that  
20 letter sealed.

21 MR. CREIZMAN: Right.

22 THE COURT: Then there is yet another letter that  
23 was submitted yesterday, right?

24 MR. CREIZMAN: Correct, your Honor.

25 THE COURT: And the Government has sent a letter

Proceedings

7

1 December 14th.

2 Is there any other materials that the Court should  
3 have?

4 MR. CREIZMAN: Yes, your Honor.

5 Yesterday I sent in a reply to the Government's  
6 brief, and in addition, I forwarded a letter from the mother  
7 of Mr. Thompson's children, a Renice Rivera, and I don't know  
8 if your Honor received that.

9 THE COURT: I don't have that.

10 MR. CREIZMAN: If I can hand one up to your Honor.  
11 (Hanging.)

12 MR. CREIZMAN: Sorry for the condition of the  
13 letter.

14 I have a copy of the reply as well.

15 THE COURT: I have the reply. The December 20th  
16 letter, correct?

17 MR. CREIZMAN: That's correct. From me, yes.  
18 (Pause in the proceedings.)

19 THE COURT: All right. Do you want to be heard, Mr.  
20 Creizman?

21 MR. CREIZMAN: I do, your Honor.

22 Your Honor, this is a fairly straightforward  
23 argument I have for sentencing. Mr. Thompson cooperated and  
24 provided substantial assistance to state authorities. He wore  
25 a wire while in prison in Rikers Island and taped a

## Proceedings

8

1 conversation with a violent felon, a gang member. Because of  
2 that substantial assistance, the assistant district attorney  
3 and the district attorney's office approved that -- allowed  
4 Mr. Thompson to plead guilty to a misdemeanor count of  
5 reckless endangerment for a sentence of ninety days. That  
6 satisfied the city's interests in prosecuting the matter.

7 In addition to that, there is a certificate of  
8 disposition pointed out by Probation in paragraph forty-three  
9 of their report, that specifies that the Richmond County  
10 sentence, the ninety-day sentence, should run concurrently to  
11 the sentence for the instant offense. Now, that does not  
12 obviously --

13 THE COURT: I'm sorry. What are you referring to?

14 MR. CREIZMAN: In addition to the ninety-day  
15 sentence, there is a certificate of disposition from the  
16 Supreme Court of Richmond County that, I guess, recommends  
17 that the state sentence should run concurrently to the  
18 sentence for the federal, run concurrently to the federal  
19 sentence.

20 Now, obviously that's not binding on this court, but  
21 it demonstrates that Staten Island in representing the city  
22 believes that its interests were fulfilled in its prosecution  
23 of Mr. Thompson by the ninety-day sentence and that it would  
24 be fulfilled if that ninety-day sentence ran concurrently with  
25 the sentence in this case.



Proceedings

9

1           We know that both the Government and the defense  
2 agree that the guidelines here for this offense are eight to  
3 twelve months.

4           THE COURT: Fourteen, I think.

5           MR. CREIZMAN: Eight to fourteen months?

6           MR. TOOSSI: Yes.

7           MR. CREIZMAN: Okay. I'm sorry. Eight to fourteen  
8 months.

9           If we run the sentences concurrently and look at  
10 how --

11          THE COURT: Well, he's already served his state  
12 sentence. There's nothing to run concurrent.

13          MR. CREIZMAN: Right. I understand that, your  
14 Honor. But, if you run the November -- if he was in jail from  
15 November 20th when he was caught for his state offense while  
16 he was a fugitive, he spent eight months in Rikers Island, and  
17 then another four months in the MDC. And your Honor can  
18 recognize that both of these institutions are not prison  
19 camps. They are harsh. They are harsh institutions.

20          So, if you -- he had four months remaining on his  
21 sentence when he escaped from the halfway house. So, if you  
22 take off --

23          THE COURT: Well, yes. What happens with that?

24          MR. CREIZMAN: Well, I think there's a -- if he  
25 serves his -- he had four months undischarged.

Proceedings

10

1 THE COURT: So how does my sentence work with that?

2 MR. CREIZMAN: Under the guidelines, the guidelines  
3 recommend that your Honor run it consec -- the undischarged  
4 term run consecutively with the sentence for this offense.  
5 That's what the guidelines recommend.

6 But, as I said --

7 THE COURT: Excuse me. I'm sorry, Mr. Creizman.

8 (Pause in the proceedings.)

9 THE COURT: I'm sorry. Go ahead.

10 MR. CREIZMAN: Sure.

11 But, as I said, your Honor --

12 THE COURT: Well, has he begun to serve the four  
13 months?

14 MR. CREIZMAN: Well, in my opinion, yes, and I'll  
15 explain why.

16 I think that the eight months he spent in Rikers,  
17 plus the four months in the MDC, he's already served four  
18 months in the MDC.

19 THE COURT: So that counts to the undischarged  
20 portion of his sentence?

21 MR. CREIZMAN: That could count to the undischarged  
22 portion of his sentence.

23 I mean, it's within your Honor's discretion to  
24 require that the undischarged portion of his sentence be  
25 served consecutively. The guidelines recommend it, but it's

## Proceedings

11

1 not mandatory.

2 But, what I'm saying here is that if the four months  
3 he has served in prison, whether or not, you know, it's state  
4 prison or federal prison, what I'm arguing is that he served  
5 time in prison for twelve months. Four of those months, let's  
6 count that towards the undischarged term of imprisonment, the  
7 four months from the time he escaped, and then another eight  
8 months in the confines of Rikers and the MDC all together, in  
9 my view, I think satisfies the guideline sentence here. Not  
10 technically, but I think it should satisfy the guideline  
11 sentence here. I think it should satisfy his need for --

12 THE COURT: Why should he get a sentence that's  
13 concurrent to the undischarged portion of the sentence he was  
14 previously serving? Why does that make any sense? Quite  
15 apart from Rikers, why would that make sense?

16 MR. CREIZMAN: Well, your Honor, I think for one  
17 thing, he's served a substantial amount of time in harsh  
18 prison confines.

19 Number two, he's demonstrated a willingness to turn  
20 his life around by cooperating. He's 27 years old. He's been  
21 in jail for much of his life since at least the age of 20 and  
22 then before that in juvenile detention homes and so forth.

23 He has two children. He is interested in starting a  
24 new life in terms of getting a job, and the letter from the  
25 mother of his children testifies to that, and she's in a job

## Proceedings

12

1 placement company where she can actually help Mr. Thompson,  
2 and Mr. Thompson's fortunate for that.

3 So, in my view, he has served hard time. He has  
4 paid for his sentence. I think that all of the goals of  
5 sentencing have been satisfied in this case by his twelve  
6 months, four months in the MDC and eight months at Rikers  
7 Island.

8 Over and above the ninety-day sentence imposed by  
9 the state, I think that that -- whether you run that  
10 concurrently or whether your Honor wants to run it  
11 consecutively --

12 THE COURT: Well, if you're talking about the state  
13 sentence, there's nothing to run concurrently or consecutive.  
14 He's served his state sentence.

15 MR. CREIZMAN: I understand.

16 THE COURT: The question would be, unless I'm  
17 mistaken, in terms of concurrent or consecutive would be with  
18 regard to the undischarged portion of his remaining federal  
19 sentence.

20 MR. CREIZMAN: I understand that, your Honor.

21 THE COURT: And he would have gotten -- in other  
22 words, assuming I imposed a sentence consecutive to the  
23 portion, he gets credit for the four months he's already spent  
24 as against his.

25 MR. CREIZMAN: I believe that's not disputed.

## Proceedings

13

1 THE COURT: Before I finish, Mr. Toossi, did you  
2 want to add something with respect to this?

3 MR. TOOSSI: Right. My understanding with respect  
4 to his time that he spent incarcerated since he was writted  
5 over from the state, that is not being credited towards his  
6 prior conviction. What will happen after he receives a  
7 sentence in this case is --

8 THE COURT: He's on a writ?

9 MR. TOOSSI: Yes.

10 THE COURT: Hasn't he finished serving his sentence?

11 MR. TOOSSI: He was on a writ, but then we writted  
12 him out of state custody because his case was still pending  
13 when we writted him out. That writ has been -- I'm actually  
14 not sure what has happened to it, but it was -- hold on. Let  
15 me figure out exactly how this worked because when we writted  
16 him over from state custody when he had to go back for his  
17 state case, the district attorney's office in Staten Island  
18 actually had to writ him back to them. I don't believe that  
19 our writ is still in effect. I think it's moot at this point.

20 I've actually never encountered that situation where  
21 we didn't return him to state custody for another reason.

22 But, in terms of the time he actually spent in MDC,  
23 yes, it's been since late August. In terms of the time  
24 that --

25 THE COURT: But was he brought back over during that

Proceedings

14

1 time period to the state court?

2 MR. TOOSSI: Yes, because he was sentenced in  
3 November.

4 MR. CREIZMAN: That's correct.

5 THE COURT: I think you all are going to have to do  
6 some calculations for me, in fairness to the defendant,  
7 because I don't know how all this works, and I may be thinking  
8 that he's getting credit for something that he's not getting  
9 credit for.

10 So I think you need to check with the Bureau of  
11 Prisons to make sure with this writ situation at what point in  
12 time did he begin getting credit for his federal custody,  
13 because if you're talking about writs and going back and  
14 forth, he might not have been getting credit since August  
15 because if he had not -- when was he sentenced in the state  
16 court?

17 MR. CREIZMAN: November.

18 MR. TOOSSI: In November.

19 THE COURT: You believe he's been getting credit  
20 since he's been here in August?

21 MR. TOOSSI: That's --

22 THE COURT: I don't think so.

23 MR. CREIZMAN: I mean, that's my understanding, but  
24 I could be wrong.

25 It certainly -- I think, your Honor, I think that in

## Proceedings

15

1 terms of the time that he's spent in prison, I do think that  
2 the concentrated time that he spent in prison should  
3 accomplish the goals of sentencing here, whether or not it  
4 counts under the Bureau of Prison rules or not. He has  
5 certainly learned his lesson.

6 THE COURT: Well, you know, I've had problems with  
7 the fact, and this is why I think it's important for someone  
8 to make these calculations and to make sure they're correct.  
9 Essentially, the extra time that he has spent encompasses this  
10 five-month period because the ninety days he got, and that was  
11 his sentence as a result of the cooperation, to the extent  
12 that there's an argument that he spent extra time, it would  
13 have been the five months.

14 MR. TOOSI: Your Honor, just going back to on  
15 whether he's been getting credit since August. It's my  
16 understanding that he has because there was a permanent order  
17 of detention ordered by the magistrate judge when he was  
18 arraigned on the complaint back in August. So once there was  
19 actually a permanent order of detention from the federal  
20 court, we weren't holding him because he was in on a state  
21 sentence.

22 So, for example, if you had a witness who was coming  
23 in from the state, now the only reason why we have them in  
24 custody is because we're holding them for the state. Once we  
25 actually say we want to hold them, so even if the state said

## Proceedings

16

1 that person is to be released, which is in fact in this case  
2 what would have happened in November once he was sentenced on  
3 the state case, he wasn't released because there was a  
4 permanent order of detention on this case. So, my  
5 understanding --

6 THE COURT: I'm not sure, though, if he is still in  
7 state custody and you've got him on a writ that that is  
8 correct.

9 MR. TOOSSI: Even if there's a permanent order of  
10 detention?

11 THE COURT: Even if there's a permanent order of  
12 detention.

13 I'm not sure he got that credit.

14 MR. TOOSSI: Your Honor, if you give me five  
15 minutes, I can call over to the MDC Legal and find out what  
16 their position is on that.

17 THE COURT: Well, what is the Government's position  
18 about the, not legally, but in terms of the appropriate  
19 sentence, about the five months that he spent in custody in  
20 the state court in addition to the ninety-day sentence that he  
21 got? Why isn't that something the Court could at least  
22 consider?

23 MR. TOOSSI: Well, I certainly believe that it's  
24 something that the Court should consider under 3553(a).

25 Our position is that the unique factors that led to



## Proceedings

17

1 that period of incarceration don't warrant a downward  
2 departure or variance in this case, and it's just one factor  
3 to consider, but it wouldn't be dispositive of what the  
4 ultimate sentence should be.

5 And specifically, and I've mentioned this in my  
6 letter, the conduct that led to his capture was specifically  
7 dangerous, specifically malicious. He had stolen a car. He  
8 had led the police on a chase over the Staten Island  
9 expressway. He could have killed somebody. What the Staten  
10 Island DA's office wants to do with that charge is up to them,  
11 and it's separate sovereigns, obviously, but his cooperation  
12 was not completed until shortly before he was brought into  
13 federal custody.

14 When Mr. Creizman is talking about wearing the wire  
15 in Rikers Island, that happened shortly before he was brought  
16 over. So there's only a very narrow period of time where he's  
17 not in Rikers in furtherance of his cooperation. And, if you  
18 look at the dates that he's pleading guilty to these  
19 cooperation agreements, they're not until -- it's not until  
20 July 2nd that he actually pleads guilty to this ultimate  
21 cooperation agreement which allows him to withdraw his felony  
22 plea and enter into a misdemeanor plea.

23 So, the Government's position in terms of this extra  
24 time is that extra time was actually spent to Mr. Thompson's  
25 credit. He was actually engaged in cooperation, and he was

## Proceedings

18

1 given a benefit of not having to face a three-year mandatory  
2 minimum in the state and in its place had gotten a ninety-day  
3 sentence. So that extra time, it's hard for me to articulate  
4 this, and your Honor, I was thinking about exactly how to  
5 articulate it, but the equities are not with the defendant on  
6 that score just because he's already gotten a huge benefit of  
7 more than two years off of a state sentence.

8 I just wanted to briefly respond to something that  
9 was in Mr. Creizman's letter of December 20th. He says that  
10 the Government has not identified what credit Mr. Thompson has  
11 received in the instant case.

12 Well, your Honor, if he had pled guilty to a felony,  
13 he would be looking at a four-point enhancement, which would  
14 dramatically change his guidelines calculation. So, the fact  
15 that he was allowed to withdraw his plea and to replead to a  
16 misdemeanor, you know, brought down his guidelines by about  
17 ten months on the bottom end.

18 So, has he gotten a benefit in the state? Yes,  
19 more than two years off of his incarceration. Has he gotten a  
20 benefit in this case? Yes, almost ten months off of the  
21 bottom of the guidelines. That's a tremendous amount of  
22 credit for what he's done, and, frankly, to give him credit  
23 for that period is to, in practical effect, makes it so that  
24 there is really no punishment for leaving the halfway house  
25 and committing a crime while he was on release. Or, not while

## Proceedings

19

1 he was on release. While he was on escape status.

2 So, you know, I know Mr. Creizman has characterized  
3 that position as callous and draconian, but my point isn't to  
4 be callous or draconian. It's more to say that there has to  
5 be a penalty.

6 Now, if the guidelines in this case were, you know,  
7 120 months, I might be inclined to say yeah, give him a break  
8 for the five months because he's already going to be serving a  
9 substantial period of time in custody, but in this case where  
10 the guideline is so low, what that really ends up being is no  
11 punishment at all, and I don't think that that's appropriate.  
12 That's why when balancing those factors under 3553(a), I don't  
13 think that they militate in favor of a below-guideline  
14 sentence.

15 MR. CREIZMAN: Your Honor, I don't believe that the  
16 Government is giving Mr. Thompson any credit for his  
17 cooperation by taking that position.

18 By cooperating, he didn't get -- it's not like he  
19 walked away with a benefit from the state. He put his life on  
20 the line by wearing a wire in prison, and the state who had  
21 jurisdiction over this matter believed that its interests were  
22 satisfied by Mr. Thompson's -- by a ninety-day sentence.

23 Mr. Toossi and the Government may not like the way  
24 the Staten Island DA handled that case, and he might have  
25 handled it differently, but the bottom line is that Staten

## Proceedings

20

1 Island was the prosecuting authority, and it seems to me that  
2 the Government is asking for an upward departure in this case  
3 because of his behavior, you know, for the state offense.

4 The district attorney's office in Staten Island is  
5 perfectly satisfied with Mr. Thompson's ninety-day sentence  
6 and, in fact, is satisfied with that not reducing any sentence  
7 from, you know, taking away from the federal sense. Meaning  
8 it would be just as happy with the ninety days not counting  
9 towards, basically not taking away from his federal sentence.  
10 Meaning, you know, count all twelve months or thirteen months  
11 that he served in Rikers or the MDC towards the federal  
12 sentence.

13 Now, that doesn't mean your Honor has to -- that's  
14 not legally binding, but that to me says that Staten Island  
15 believes that what he's done has been substantial, and people  
16 who have cooperated have gotten away with a lot less and he's  
17 provided substantial cooperation.

18 I think the twelve months he served here are more  
19 than, or the thirteen months that he served is more than  
20 enough, more than sufficient to satisfy the four goals of  
21 sentencing.

22 And I'd like to add just one or two more points.  
23 That his parents, who are here in this courtroom, are elderly.  
24 They are in poor health. Mr. Douglas would like to be able to  
25 help them outside of prison and like to spend time with them.

## Proceedings

21

1           In addition to that, and as I said, he would like to  
2     care for his children. He would like to get a job. He would  
3     like to do something positive with his life. And I think that  
4     he turned a corner when he began cooperating for the state,  
5     for the local authorities. That's the first time that he did  
6     that.

7           MR. TOOSSI: I don't actually think that's true, but  
8     I don't think that it's necessary for me to respond to it.

9           I'm perfectly happy to accept that it's the first  
10    time, but the reality is, and I pointed this out in the  
11    letter, your Honor, is that he agreed to cooperate because he  
12    was looking at mandatory state jail time, upstate jail time,  
13    and that was the impetus to cooperate. It wasn't that he had  
14    turned a corner.

15          In terms of if we're going to look at Mr. Thompson's  
16    background. Explicitly I'm not arguing for where it should  
17    fall in the guidelines. I'm simply arguing for a guideline  
18    sentence, just to make that clear.

19          But, this wasn't the first time that Mr. Thompson  
20    had led the police on a high-speed chase. In 1999, and this  
21    is in paragraph 29 of the PSR.

22          MR. CREIZMAN: I'm sorry, paragraph?

23          MR. TOOSSI: Twenty-nine.

24          When police officers motioned the defendant to pull  
25    his car over, he ignored their directives and drove away

1 recklessly at a high rate of speed, in excess of 50 miles per  
2 hour in a 30 mile per hour zone ignoring two stop signs and  
3 weaving through traffic. He struck another vehicle during  
4 this incident, and when he was pulled over, he was found to be  
5 driving without a valid license.

6 I mean, that's almost the same conduct that he  
7 engaged in in 2009.

8 MR. CREIZMAN: Well, to be fair, your Honor, he was  
9 sixteen years old at the time of the incident that Mr. Toossi  
10 described.

11 MR. TOOSSI: But that's my point is that we don't  
12 see an arc of development in this defendant that says he's  
13 turning a corner. We see a defendant who's not learning.

14 I also sympathize with the difficult circumstances  
15 that Mr. Thompson grew up in, I certainly do, but he is, in  
16 five days he will be turning 28 years old. He's a grown man  
17 and has been for ten years, and at some point, he has to  
18 respond for his conduct. I think that comes down -- that's  
19 the theme of my argument, your Honor, is that there has to be  
20 a penalty for what he did, and to say well, you go into state  
21 custody and you cooperate, and that's a good thing, I'm not  
22 saying that that's a bad thing. I'm not saying that I don't  
23 approve of what the Staten Island DA did. My only point is  
24 that there was a separate crime unto itself which was the  
25 escape, which is a serious crime. I mean, he was given a

## Proceedings

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1 chance by the BOP and he decided to flee. I think there  
2 should be a punishment for that, and I don't think it should  
3 just be lumped into with his cooperation in the state case.

4 MR. CREIZMAN: Your Honor, just a couple points in  
5 response.

6 To say that Mr. Thompson cooperated because he was  
7 trying to avoid a mandatory three-year sentence, that of  
8 course, a reduction in sentence is always part of a motivation  
9 of a cooperator. There is no question about that. And I  
10 don't know why Mr. Toossi -- if he has information that Mr.  
11 Thompson cooperated before, then he should say so, but not  
12 suggest that he's done this before.

13 But, the fact of the matter is, is that the person  
14 that Mr. Thompson cooperated against is now serving time in  
15 federal custody partially because of Mr. Thompson's  
16 cooperation, as I understand it.

17 MR. TOOSSI: That's not true.

18 MR. CREIZMAN: That's not true?

19 MR. TOOSSI: That's not true.

20 MR. CREIZMAN: Then my understanding is wrong, but I  
21 know that he is serving time in federal custody.

22 And I also understand that the person Mr. Thompson  
23 cooperated against was a person who killed a friend of his,  
24 and I think Mr. Thompson realizes that the life that he needs  
25 to live is not going to be with gangs. It's not going to be

## Proceedings

24

1 successful on the streets. I think he understands that.

2 And his girlfriend and the mother of his two  
3 children has a very stable life. She's been employed for  
4 quite a while. She puts other people into jobs, and I think  
5 that she will be a very good influence on Mr. Thompson in that  
6 regard when he leaves prison.

7 THE COURT: All right. Well, why don't I give the  
8 two of you a few moments to see if you can figure out what the  
9 answer to my question is because I think it's an important  
10 question to have answered before we proceed.

11 I will recall the case at quarter to eleven.

12 (Case adjourned.)

13

14 (In open court at 4:00 p.m.)

15 (Judge Amon resumes the bench.)

16 (Defendant enters.)

17 COURTROOM DEPUTY: The United States against  
18 Thompson.

19 THE COURT: All right. Good afternoon.

20 Mr. Toossi, did you find out the answer to the  
21 question?

22 MR. TOOSSI: Yes, your Honor. I spoke with Adam  
23 Johnson, who's in the legal department at the Bureau of  
24 Prisons, and he consulted with Hank Sadowski, who is the  
25 regional director of the BOP for the northeast. My



## Proceedings

25

1 understanding from speaking with them is that state time is  
2 not credited by the BOP. However, the only state time that  
3 the defendant served was the ninety days that he was actually  
4 sentenced to.

5 So, under Section 3585, he is credited with, the BOP  
6 in calculating his sentence and the amount of time he is to be  
7 incarcerated, will calculate from the ninety-first day that he  
8 was in state custody until the present.

9 THE COURT: And how much time, then, has he gotten  
10 credit for on the undischarged portion?

11 MR. TOOSI: The ninety days will take him from  
12 November 18th until January 17th of this year.

13 Is that correct? November to December -- no, I'm  
14 sorry. February 17th of this year. So will be from February  
15 17th of this year. So then from February 17th until the  
16 present, he will have the sentence on this case will -- let me  
17 back up.

18 He's got two federal issues right now. He's got the  
19 sentence that he didn't complete, and he's going to -- they're  
20 going to take his good time credit away. So it's not merely  
21 the four months between the June escape and the October  
22 anticipated release date. I didn't actually have BOP  
23 calculate exactly how much good time he was going to lose  
24 because they can't do that. That would actually be a facility  
25 in Texas that does that. But it looks like it's going to be

Proceedings

26

1 about six or seven months.

2 So, the time -- they take that time and then  
3 whatever he gets on this case will be basically strung out  
4 from February 16th of this year and --

5 THE COURT: So how much federal time has he served  
6 already?

7 MR. TOOSSI: February 17th until now would be --

8 MR. CREIZMAN: Wouldn't that be over ten months?

9 MR. TOOSSI: -- over ten months.

10 MR. CREIZMAN: I was thinking a little bit over.

11 THE COURT: Why were we thinking earlier -- was I  
12 under a misimpression because I thought he had gotten credit  
13 for only like four months.

14 MR. TOOSSI: Well, that's -- see, that -- in my  
15 prior experience with cases where a defendant is taken out of  
16 custody from the state, it hasn't implicated Section 3585. So  
17 the mantra that goes around is he doesn't get credit for state  
18 time. And, in fact, that was why it was kind of difficult to  
19 figure out exactly what was going to happen here because  
20 people will say he doesn't get credit for state time, but  
21 that's not entirely accurate.

22 For example, if the --

23 THE COURT: When did he finish serving his  
24 ninety-day sentence? Is that February 19th?

25 MR. TOOSSI: February 16th, yeah.

Proceedings

27

1 THE COURT: So that's the end of his state sentence.

2 MR. TOOSSI: And that's the time he doesn't get  
3 credit for.

4 THE COURT: Right. But anything after, starting  
5 February 17th.

6 MR. TOOSSI: That implicates 3585 and he does get --

7 THE COURT: So he's in federal custody.

8 MR. TOOSSI: Even though he's not in federal  
9 custody, he gets --

10 THE COURT: Why isn't he in federal custody as of  
11 February 17th when he finished serving his state term? Why  
12 isn't he in federal custody then?

13 MR. TOOSSI: I just want to make sure I understand  
14 your question because I don't know if you mean practically why  
15 he wasn't transferred over, or legally speaking why aren't  
16 we -- like is it a legal fiction that he's in federal custody,  
17 because it's not clear to me what -- because he wasn't given  
18 that ninety-day sentence until November of this year. It  
19 works retroactively, I guess, if that makes sense.

20 MR. CREIZMAN: If I could, I might be able to answer  
21 the question because I read --

22 THE COURT: Well, he got the ninety-day sentence.

23 MR. TOOSSI: Right. But he got it in November of  
24 this year, and the way that the state calculated it is it's  
25 basically, you know, we're sorry that you spent this much time

## Proceedings

28

1 in jail, but your sentence was actually this. That's what  
2 they did.

3 Now, in terms of how BOP will calculate it, I mean,  
4 they really could have saved us a lot of time by just giving  
5 him time served, but they didn't do that. They gave him a  
6 definitive sentence. And I spoke with the ADA to understand  
7 exactly why.

8 THE COURT: Why they do that.

9 MR. TOOSSI: Yeah. They were trying to help us.  
10 The idea being that if it were a time-served sentence, he  
11 would have to be taken back to Rikers Island for processing  
12 and if it was a determinative sentence, it was cut off and he  
13 was now federal custody. There was a misunderstanding on  
14 their part as to what exactly needed to be done.

15 THE COURT: Are you positive then that he gets  
16 credit?

17 MR. TOOSSI: That's my understanding from --

18 THE COURT: So they go all the way back up to the  
19 beginning, and they give him those three months.

20 So where has he been for the remaining five months?  
21 In federal custody?

22 MR. TOOSSI: They will not -- they won't say that  
23 he's in federal custody. What they will say is that under  
24 3585 he is in official detention, and the fact that he was in  
25 official detention between February 16th and now, regardless

## Proceedings

29

1 of whether it was at Rikers Island or at the MDC, that he will  
2 get credit for that time, and that's because the offense  
3 preceded -- the offense of this case preceded the offense in  
4 that case.

5 THE COURT: Was he under an order of detention from  
6 this court? He wasn't as of February, was he? Or was he?

7 MR. TOOSSI: No. The permanent order of detention  
8 was entered by the Eastern District on August 27th of this  
9 year.

10 THE COURT: So, effectively, he is now getting  
11 credit for ten months, approximately ten months.

12 MR. TOOSSI: Yes. Yes.

13 And now there are some -- what was the word that  
14 they used for it? There is a specific type of letter. Judge  
15 Garaufis has to actually sign off on his getting credit for  
16 that period of time as it applies to that sentence.

17 THE COURT: Why does Judge Garaufis have to sign off  
18 on that?

19 MR. TOOSSI: What the BOP apparently will do is --

20 THE COURT: Do the parties believe that under these  
21 circumstances, with Judge Garaufis having to sign off on this,  
22 that this case should be before Judge Garaufis?

23 MR. TOOSSI: No, only because --

24 THE COURT: Well, because only Judge Garaufis knows  
25 if he's going to sign off on that, correct?

## Proceedings

30

1 MR. TOOSSI: That's correct.

2 THE COURT: And it seems like to me that this entire  
3 case ought to be before Judge Garaufis because the flight was  
4 from a sentence imposed by Judge Garaufis. And that's a big  
5 unknown, what Judge Garaufis will do, and it seems like to me  
6 that this all ought to be in context before the same judge if  
7 that unknown is out there because I may well be sentencing him  
8 believing that Judge Garaufis is going to do that and then  
9 Judge Garaufis might not do that.

10 It seems like to me, I have to say I spoke with  
11 Judge Garaufis about this case this morning, about whether it  
12 should be transferred to him. I didn't want to hold the  
13 matter up, and I was perfectly prepared to go forward with it.  
14 Judge Garaufis was also prepared to take the case.

15 Based on what you've told me now, I think it makes  
16 more sense to have Judge Garaufis do that as opposed to having  
17 me sentence him, or my engage in sentencing under the  
18 assumption that Judge Garaufis is going to do that, then Judge  
19 Garaufis not do that.

20 I mean, it really plays into what the appropriate  
21 sentence would be. Do you disagree, Mr. Creizman?

22 MR. CREIZMAN: I would talk to my client to see what  
23 his position is.

24 THE COURT: I don't know that he can oppose it.

25 MR. CREIZMAN: Right. But my position standing here

## Proceedings

31

1 is that he has been incarcerated for thirteen months, and I  
2 think that based on his parents' health and based on  
3 everything, you know, all the circumstances that are -- that I  
4 submitted in my memo, I really think that the Court could  
5 decide this case under 18 U.S.C. 3553(a) without further  
6 delay.

7           When I left the courtroom, Mr. Thompson's parents  
8 came over to me and said, "Can you do whatever you can to get  
9 him out? We need help. We can't walk around. We are not  
10 mobile." The father is blind, essentially blind.

11           THE COURT: Let me just stop you, Mr. Creizman.

12           To me it makes an enormous difference whether he  
13 gets credit for this time or doesn't get credit for the time.  
14 It changes the sentence, in my mind.

15           I don't think that under all circumstances that Mr.  
16 Thompson necessarily, no matter what the circumstances are,  
17 will walk out of this courtroom today. So I think it's  
18 significant to any judge who sentences him to have the answer  
19 to this question. I don't think his picture is such that  
20 based on his prior record, on what happened in the state  
21 court, to say that no matter what he gets to go home today. I  
22 don't see it that way. It would make a difference if he -- I  
23 just think that that's a question that needs to be answered.  
24 I understand your position, but I think the answer depends on  
25 what happens.

Proceedings

32

1 MR. CREIZMAN: Well, your Honor, I understand that.  
2 And if that is an important consideration for the Court, I  
3 can't oppose that, but I would say that --

4 THE COURT: The question is whether it be -- I think  
5 that because the only person who's going to answer that  
6 question is Judge Garaufis, that then the entire matter ought  
7 to be before Judge Garaufis.

8 MR. TOOSSI: Your Honor, did you have any discussion  
9 with Judge Garaufis about when he would be prepared to hear  
10 the case?

11 THE COURT: No.

12 MR. CREIZMAN: Your Honor, could I make an  
13 application for Mr. Thompson to be released on bail pending  
14 Judge Garaufis' sentence? He would be on home detention with  
15 electronic monitoring. He would accept, you know, all  
16 conditions of release as strict as possible. All he would  
17 want to do is take his parents to the doctor, to their  
18 doctors, and perhaps take his children to school and to help  
19 out in that regard.

20 THE COURT: I wouldn't be prepared to do that.

21 In having it reassigned, I'd communicate your view  
22 that it needs to be done as soon as possible.

23 MR. CREIZMAN: I would appreciate that, but if it's  
24 possible --

25 THE COURT: I just think it's something that's



Proceedings

33

1 really out of my control.

2 MR. CREIZMAN: Right.

3 But, is there any package that we could --

4 THE COURT: I don't think that's appropriate.

5 MR. TOOSSI: May I be heard on bail, your Honor?

6 THE COURT: Well, unless you're willing to suggest  
7 that bail be granted --

8 MR. TOOSSI: No.

9 THE COURT: -- I don't think there's a need to be  
10 heard.

11 MR. TOOSSI: Okay.

12 THE COURT: Let me talk to Judge Garaufis, and I  
13 will just express to him, you know, I don't know what his  
14 schedule is at all, but I will express to him that the parties  
15 desire to have this and dealt with as expeditiously as  
16 possible. But I do think that that prong makes it difficult  
17 for me to proceed.

18 MR. CREIZMAN: If that's the case, then it would  
19 seem appropriate to go before Judge Garaufis.

20 THE COURT: All right. Let me see, and I'll have my  
21 courtroom deputy get back to you as soon as we find out.

22 MR. CREIZMAN: Thank you, your Honor.

23 MR. TOOSSI: Thank you, your Honor.

24 (Defendant remanded.)

25 (Time noted: 4:32 p.m.)